



State Insurance Regulatory Authority
Workers Compensation
Merit Review Service

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS

1. The Worker has current work capacity.
2. The Worker is not entitled to weekly payments of compensation because he does not meet the special requirements under section 38(3) of the *Workers Compensation Act 1987*(the 1987 Act).

RECOMMENDATIONS

3. The Authority may make binding recommendations to the Insurer based on the findings of this merit review. No recommendations are made for the reasons given below.

BACKGROUND

4. The Worker has been receiving weekly payments of compensation for incapacity for work resulting from an injury. The Insurer accepts that the Worker injured his elbows and right thumb doing physically repetitive work.
5. The Insurer made a work capacity decision to discontinue the Worker's weekly payments of compensation on the basis that he had current work capacity and did not meet the special requirements under section 38(3) of the 1987 Act.
6. The Worker referred that decision for internal review. The Insurer affirmed its original decision.
7. The Worker applied for merit review by the Authority. His application was made within time and in the approved form.

LEGISLATION

8. The legislation governing work capacity decisions and reviews is contained in the:
 - *Workers Compensation Act 1987*(the 1987 Act)
 - *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)
 - *Workers Compensation Regulation 2016* (the Regulation)

9. Section 43 of the 1987 Act describes a 'work capacity decision'. Section 44BB of the 1987 Act allows an injured worker to refer a work capacity decision for merit review by the Authority. The Authority is to notify the insurer and the worker of the findings of the review and may make recommendations to the insurer based on those findings: section 44BB(3)(e). Recommendations are binding and must be given effect to by the insurer: section 44BB(3)(g).

DOCUMENTS

10. The documents considered for this review are: the application for merit review and the Insurer's reply form, the documents listed in and attached to those forms, and any further information provided to the Authority and exchanged between the Worker and the Insurer.

SUBMISSIONS

11. The Worker's submissions are set out in his application for merit review. He has provided a further certificate of capacity from his treating doctor in support of his application. The Insurer lodged its submissions in reply. I have considered all of the submissions and addressed the issues raised by them in the reasons below.

REASONS

Nature of merit review

12. This is a merit review of the decision to discontinue the Worker's weekly payments of compensation on the basis that he has current work capacity and does not meet the special requirements under section 38 of the 1987 Act to be entitled to weekly payments after the second entitlement period. The Authority must consider the available information on its merit and make findings that are most correct and preferable. It is not a review of the Insurer's procedures in making the work capacity decision.

Current work capacity

13. Section 32A of the 1987 Act defines 'current work capacity' and 'no current work capacity':

current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment

no current work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment.

14. The Worker has submitted a new certificate of capacity from his nominated treating doctor (NTD). The Worker is certified with capacity to work for four hours a day, five days a week with:
- Lifting/carrying up to 15kg
 - Unable to do any repetitive movements
 - Unable to handle hard work with his right hand
 - Unable to open jars.

15. Prior to this, the Worker was certified as having capacity to work eight hours a day, five days a week with the restrictions listed above.
16. The Insurer submits, in line with the earlier certificates of capacity, that the Worker has capacity to work full-time. The Insurer also refers to two reports from a sports physician. The more recent report stated:

[The Worker] continues to be medically cleared to work pre-injury hours with a lifting restriction of <5kgs either arm and <20 kgs both arms and to try to minimize repetitive lifting and I encourage job seeking.

17. The sports physician's opinion is generally consistent with the certificates of capacity. However, there is now a difference of opinion on the hours of work the Worker is able to do. The sport physician's report is more than six months old while the certificates of capacity give a more up-to-date assessment. I prefer the certificates of capacity for assessing the Worker's current work capacity.
18. I find that the Worker has a present inability arising from the injury such that he is only able to return to work for four hours a day, five days a week with lifting/carrying up to 15kg and is unable to do any repetitive movements, handle hard work with his right hand, or open jars.
19. The Worker's pre-injury employment required repetitive upper arm use. He cannot do that now due to his injury. I accept that the Worker has a present inability arising from an injury such that he is not able to return to his pre-injury employment.
20. To determine if the Worker has current work capacity, I must consider if he is able to return to work in 'suitable employment' as defined by section 32A of the 1987 Act:

Suitable employment, in relation to a worker, means employment in work for which the worker is currently suited:

(a) having regard to:

- (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 448), and
- (ii) the worker's age, education, skills and work experience, and
- (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
- (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
- (v) such other matters as the WorkCover Guidelines may specify, and

(b) regardless of:

- (i) whether the work or the employment is available, and
- (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
- (iii) the nature of the worker's pre-injury employment, and
- (iv) the worker's place of residence.

21. An occupational rehabilitation provider prepared a vocational assessment report and a vocational review report. Employment as a packer, process worker, assembler, sales assistant (hardware), store person, administrator assistant and spare parts interpreter was suggested as suitable for the Worker. A labour market analysis report provided updated employment market information for some of these jobs.

22. For the reasons to follow, I am persuaded that sales assistant (hardware) constitutes suitable employment for the Worker.
23. The core duties of a sales assistant are set out in the vocational assessment report. The work involves some manual handling to stack products for display, show customers how the product works, and package products for customers after sale. Obviously, the level of physical demand involved in this type of work will vary depending on the products being sold. The occupational rehabilitation provider has given examples in its vocational assessment report and labour market analysis report of specific employers with sales assistant (hardware) jobs that would be physically suitable for the Worker.
24. The return to work option of sales assistant (hardware) has been supported by the NTD. The NTD sent a signed facsimile to the occupational rehabilitation provider to support sales assistant (hardware) as a suitable return to work option for the Worker. The NTD's certificate of capacity stated that the Worker only had a lifting/carrying capacity of 5kg, driving ability up to 15 minutes, capacity in other areas "as tolerated" and an inability to do any repetitive movement, hard work with his right hand, or open jars. The recent certificates of capacity support that the Worker's level of function has improved. He is therefore more likely to be physically suited to work as a sales assistant (hardware) now than he was.
25. The Worker is only certified to work four hours a day, five days a week, having previously been certified to work full-time. However, employers contacted by the occupational rehabilitation provider as part of labour market analysis report consistently reported that there is part-time work in this area of employment and I accept that to be the case. Everyday experience supports sales assistant employment is a large and diverse field of work. Even within the hardware retail industry there are many different retailers ranging from large companies to small businesses. It is entirely plausible that there is part-time work for sales assistants (hardware) in the employment market suitable for the Worker consistent with what the occupational rehabilitation provider has reported.
26. Adding weight to the view that there is physically suitable work for the Worker as a sales assistant (hardware) in the employment market is the fact that the occupational rehabilitation provider arranged a work trial for the Worker as a sales assistant (hardware) as part of his occupational rehabilitation. The occupational rehabilitation provider arranged a six-week work trial. The occupational rehabilitation provider inspected the worksite to assess its suitability for the Worker. The work trial worksite assessment report stated that the proposed work trial was 'appropriate for the worker to commence' and the duties 'have been assessed to be within the worker's current medical restrictions'. A work trial return to work plan set out the physical demands of the duties. Relevantly, the work involved occasional lifting of batteries weighing up to 15kg. As described, the work did not require repetitive movement, opening jars or similar twisting handwork, or work that could ordinarily be described as 'hard work with his right hand'.
27. According to the work trial completion report, the Worker participated in the work trial for two non-consecutive weeks. He completed a week of full-time work ending. Afterwards, the Worker reported pain in his hip, back and neck. He obtained a certificate from his NTD that certified him as having no capacity for work. He was then certified fit to return to work and went back to the work trial. The work trial completion report stated that 'the Worker advised he had experienced left leg and hip pain as a result of prolonged standing and lifting heavy batteries during the Work Trial'. He was again certified unfit to work for a short period and returned to the work trial. The duties of the work trial were 'amended to include seated or walking rest breaks to be taken as required, and nil lifting of batteries'. However, after attending the work trial, the Worker 'advised the Work Trial Host that he would no longer be attending the remainder of the Work Trial...The Worker reported he would be pursuing an interpreting course, prior to withdrawing himself from the Work Trial'. At that point, the work trial ended.

28. I acknowledge that the Worker reported pain in his leg, hip, back and neck during the work trial which he attributed to the physical demands of the work. However, as it currently stands, the Worker's NTD has certified that he is able to return to work that does not involve lifting or carrying above 15kg or repetitive movement, opening jars or hard work with his right hand. I am persuaded by the details in the medical information before me that the Worker has the capacity to return to work in a job that is in line with the limits placed on his work capacity by The NTD. The work trial is one such example of work that is within those limits and adds weight to the view that there is such employment as a sales assistant (hardware) in the employment market.
29. The information supports that there is employment in work as a sales assistant (hardware) for which the Worker is currently suited having regard to the nature of his incapacity and the details provided in the medical information.
30. The vocational assessment report gave an overview of the Worker's age, education, skills and work experience. The Worker is age 49. He completed Year 12. He holds a car licence and a motorbike licence. His only employment has been his pre-injury employment for 10 years. Before that he worked as a mechanic. The report stated that he has average to above average computer skills. The report also listed his general skills, which includes customer service skills, good verbal communication skills and good interpersonal and people skills. The report's author stated "I observed the Worker to have excellent English communication skills". The report stated that the Worker is of an appropriate age, has appropriate English communication skills but would "benefit from undergoing a Work Trial in this vocation to increase his skill base" as he had not worked as sales assistant before.
31. As part of his occupational rehabilitation, the Worker was provided with a work trial as a sales assistant. It was practical experience in a real work environment with a real employer in the employment market. The Worker had no reported difficulty with the work with regard to his age, education, skills or work experience. I consider that the Worker's work experience as a mechanic and car buffer is consistent with him having a suitable general knowledge and skill in the use of hardware for employment as a sales assistant.
32. I consider it likely that the Worker is currently suited to employment in work as a sales assistant (hardware) having regard to his age, education, skills and work experience and occupational rehabilitation services provided to him.
33. On balance of the relevant factors, I am persuaded that sales assistant (hardware) employment constitutes 'suitable employment' for the Worker.
34. I find that the Worker has 'current work capacity' -- a present inability arising from an injury such that he is not able to return to his pre-injury employment but is able to return to work in suitable employment.

Continuation of weekly payments after second entitlement period (after week 130)

35. The 'second entitlement period' as defined by section 32A of the 1987 Act ends after 130 weeks of compensation have been paid or payable to a worker. There is no dispute in this case that 130 weeks of compensation have been paid or payable to the Worker. I accept that the Worker is after the second entitlement period and must meet the special requirements under section 38 of the 1987 Act to be entitled to ongoing weekly payments.
36. A worker with 'current work capacity' is only entitled to weekly payments after the second entitlement period if special requirements are met under section 38 of the 1987 Act as follows:

(3) A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:

- (a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and*
- (b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and*
- (c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.*

(3A) A worker with high needs who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.

37. The available information does not support that the Worker is a 'worker with high needs' as defined by section 32A of the 1987 Act. There is no expert medical evidence available to support that his injury has resulted in permanent impairment or that he meets any of the other additional requirements set out in the definition.
38. I proceed on the basis that the Worker is a worker other than a worker with high needs. He must therefore meet the special requirements under section 38(3) of the 1987 Act to be entitled to weekly payments of compensation. As the Worker has not returned to work and is not in receipt of current weekly earnings he does not meet the requirements under section 38(3)(b). He is therefore not entitled to weekly payments of compensation.
39. This is the same outcome as the Insurer's work capacity decision. No recommendations by the Authority are necessary. The Insurer's decision to discontinue the Worker's weekly payments of compensations stands.

**Merit Review Service
Delegate of the State Insurance Regulatory Authority**